Supreme Court, U.S.

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No. _____

In The

Supreme Court of the United States

October Term, 1994

VICTOR ALEXANDER, M. D.,

Petitioner,

versus

THE LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS,

Respondent.

**Petition for A Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED FOR REVIEW[1]

Louisiana Revised Statute (L.R.S.) 37:1285 A (1) affords great latitude to the Louisiana State Bord of Medical Examiners in deciding what disciplianry sanction to impose upon a physician convicted of a non-medical related crime. This case presents the question of whether the denial of a physician's right to present information about the crime for purposes of determining the appropriate sanction violates federal due process and equal protection guarantees and renders any discipline imposed arbitrary and capricious.

This case also presents the question of whether performance of the functions

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[1] The names of all parties to this proceeding appear in the caption. See Rule 14.1(b) of the Supreme Court Rules.

of prosecutor and legal advisor to the Board by the same attorney violates federal due process and fundamental fairness guarantees afforded to the respondent in a state administratrative hearing.

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THE LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS,

Respondent.

Petition for A Writ Of Certiorari to the Louisiana Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Victor Alexander, M. D.

respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the Louisiana State Supreme Court issued on Februrary 9, 1995 denying the Aplication for Writ of Certiorari to review the opinion of the Louisiana Fourth Circuit Court of Appeals.

OPINIONS DELIVERED IN THE COURTS BELOW

The February 9, 1995 the Louisiana Supreme Court under number 94-C-3075 denied the Application for Writ of Certiorari in this matter. The decision is reprinted in Appendix "A." The September 29, 1994 opinion of the Louisiana Fourth Circuit Court of Appeal under number 94-CA-0101was designated for non publication and is reprinted in Appendix " B 1-16."

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

In this petition, Victor Alexander, M. D. seeks review of a February 9, 1995 Judgment of the Louisiana Supreme Court which denied his Application for Writ of Certiorari to reiew the opinion of the Louisiana Fourth Circuit Court of Appeal. Accordingly, this Court has jurisdiction over this matter pursuant to United States Supreme Court Rule 10.1; 28 **U. S. C.**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the **United States Constitution** provides in pertinent part:

....

> ...nor shall any person...be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the **United States Constitution** provides in pertinent part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

L.R.S. 37:1285 provides in pertinent part:

> "The Board [Louisiana State Board of medical Examiners]may refuse to issue, or may suspend or revoke any license or permit or impose probationary or other restrictions on any license or permit issued under this Part for the following causes:
>
> 1) Conviction of a crime or entry of a plea of guilty or nolo contendere to a criminal charge constituting a felony under the laws of Louisiana or of the United States." (Emphasis added)

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the courts below

On or about April 13, 1989, the Louisiana State Board of Medical Examiners (hereafter frequently referred to as "the Medical Board" or "the Board") filed an Administrative Complaint against Victor Alexander, M. D. under the authority afforded it by L.R.S. 37:1285, seeking disciplinary action against him solely because of his non-medical related federal conviction for a bank robbery that occurred on May 21, 1985. This Complaint was answered by Dr. Alexander.

In accordance with the provisions of the **Louisiana Administrative Procedure Act** contained in L.R.S. 49:958 *et seq.*, an administrative hearing was conducted by the Board at its offices in New Orleans on July 20, 1989. Dr. Alexander was in attendance and was re-

presented by undersigned counsel. On August 1, 1989, the Board issued written findings of fact as required by law. The Notice of Decision was formally signed by the Board on August 10, 1989 and sent by certified mail to Dr. Alexander, through his attorney of record, on August 14, 1989.

The Board suspended the Louisiana Medical license of Dr. Alexander for a period of three (3) years from the date of the decision and then suspended and stayed the suspension, except for the period of time that he remained incarcerated. Upon his release from prison, if certain enumerated conditions were met, the Board held that it would issue Dr. Alexander a restricted medical license. The Board provided that an unrestricted license could be applied for by Dr. Alexander at a future time upon

the completion of specific requirements, including the payment of a $5,000 fine and the taking and passing of the SPEX examination [2] Dr. Alexander was to be on probation for a period of three (3) years following the receipt of an unrestricted medical license. (A complete copy of the Board's decision is contained under in Appendix "C" of this application.

On August 24, 1989, Dr. Alexander timely filed a motion entitled Application for Reopening of the Hearing as to Penalty and/or Reconsideration of the Board's Decision as to Penalty because the Board provided no articualed justification for the sanction it imposed. On September 27, 1989, this

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[2] SPEX is the acronym for Special Purpose Examination designed by the Federation of State Medical Boards of the United States, Inc.

request of Dr. Alexander was denied via letter from the Executive Director of the Board.

In accordance with the provisions of L.R.S. 49:964(B), Dr. Alexander then timely filed a Petition for Judicial Review in Civil District Court for the Parish of Orleans on October 27, 1989, seeking the opportunity to present sworn testimony in support of his Petition for Judicial Review as authorized by L.R.S. 49:964(F). Dr. Alexander, as Petitioner-Appellant, urged that the decision of the Board should be reversed because of the procedural due process violations that occurred at his hearing and, at the very least, the matter should be remanded for the presentation of further evidence relative to determination of the appropriate disciplinary penalty based on the grounds

set forth in L.R.S. 49:964(G)(1-6).

As a result of subsequent proceedings, the district court issued a Judgment on December 15, 1992 ordering that:

1) Dr. Alexander's counsel could depose Gregory Weiss, Esq., prosecutor for the Board in this matter, on the issue of procedural irregularities, in accordance with L.R.S. 49:964 (F); but that

2) Dr. Alexander could not have the matter remanded to the Medical Board for presentation of evidence on his allegation that the penalty imposed was arbitrary and capricious.

Following review of additional briefs submitted on behalf of both parties, the district court issued its Judgment on September 1, 1993, affirming the action of the Medical Board. In its

Order granting Dr. Alexander's Appeal dated October 5, 1993, the district court granted a Stay of its Judgment, pending appellate review. As a result, the decision of the Medical Board was stayed in its entirety until the conclusion of judicial review. A Notice of Appeal was timely filed in this matter on October 1, 1993.

The district court's Judgment was reviewed by the Louisiana Fourth Circuit Court of Appeal. On September 29, 1994, the Court of Appeal affirmed the Judgment of the trial court. (A copy of the Fourth Circuit's opinion is contained in Appendix " B".) A Petition for Rehearing was filed on behalf of Dr. Alexander. The Court of Appeal denied the rehearing on November 15, 1994.

Dr. Alexander then sought the review of the Louisiana Supreme Court by

a timely made Application for Writ of Certiorari. On February 9, 1995, the State Supreme Court denied his application without written reason. A copy of the written Judgment of the state Supreme Court is contained in Appendix "C."

Dr. Alexander files this Application for a Writ of Certiorari with this Honorable Court in a timely manner, having been granted an extension until May 24, 1995 to file this petition due to the natural disaster recently suffered by residents of Southeastern Louisiana, including New Orleans, as set forth in detail in the written Request for Extension filed on May 10, 1995.

B. Introductory and relevant background information

....

On May 21, 1985, the Central Savings & Loan Associa-

tion in downtown New Orleans was robbed of approximately $2,640. Still photographs and a videotape taken by the bank surveillance cameras revealed that the robber was a tall, heavy-set man with a large nose, dark hair, a dark beard and mustache, and an olive complexion. He was wearing dark brown slacks, a tan or beige sports coat, a tie, and very dark sunglasses. **United States v. Alexander**, 816 F. 2d 164, 166 (5th Cir. 1987.)

....

On May 24, 1985, FBI agents arrested Dr. Alexander [for the Central Savings and Loan robbery] and took him to their headquarters for interrogation. Dr. Alexander cooperated fully, insisting that this was simply a case of mistaken identity. Significantly, no physical evidence was ever recovered connecting Dr. Alexander with the robbery. Although the FBI conducted a thorough search of Dr. Alexander's car, office, and home, they did not find any clothes matching those worn during the robbery, or any of the money taken from the bank. The only evidence linking Dr. Alexander to the robbery was the identification of his photo

by the three bank employees. **United States v. Alexander**, *Id.* at 166 (5th Cir. 1987). (emphasis added.) [3]

On March 21, 1986, Dr. Alexander was convicted of the crime of bank robbery by a jury in the federal court for the Eastern District of Louisiana and was subsequently sentenced to serve five (5) years in the custody of the Attorney General of the United States. On April 22, 1987, Dr. Alexander's conviction was reversed by the United States Fifth Circuit Court of Appeals. **United States**

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[3] Victor Alexander is a Harvard graduate, licensed to practice medicine in the state of Louisiana and one of a very small number of physicians board certified in the specialty of occupational medicine. Throughout the ten years since his arrest, Dr. Alexander has maintained and continues to assert his innocence of the non-medical related felony of which he was convicted based solely on the uncorroborated and mistaken identification of bank employees.

v. Alexander, *Id.*

Following the reversal of this conviction, the United States Attorney decided to reprosecute Dr. Alexander and on August 10, 1987, a verdict of guilty was returned by a federal court jury. On February 24, 1988, Dr. Alexander was sentenced to serve three (3) years in the custody of the Attorney General for the United States. On April 29, 1988, in compliance with the self-surrender order of the trial court, Dr. Alexander reported to LaTuna Federal Prison Camp in Anthony, New Mexico.

While in federal custody, Dr. Alexander proceeded with the appeal of his conviction. On March 28, 1989, the United States Fifth Circuit Court of Appeals affirmed his conviction. **United States v. Alexander**, 869 F. 2d 808 (5th Cir. 1989); *rehearing denied* ,

874 F. 2d 812 (5th Cir. 1989); *cert. denied* , 493 U. S. 1069 (1989).

On December 12, 1989, Dr. Alexander was released from LaTuna to the custody of the federal halfway house in New Orleans. He completed this aspect of his confinement and successfully completed parole, which ended April 23, 1991.[4]

C. Statement of Facts relevant to the questions presented

At his administrative hearing, Dr. Alexander sought to introduce documents

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[4] At the present, Dr. Alexander is living in New Orleans, attempting to reestablish a normal professional and personal life. Dr. Alexander continues his private consultation in the speciality of occupational medicine, has authored a paper on brain cancer published in Occupational Medicine: State of the Art Reviews, co-published a publication entitled Occupational Cancer Studies Digest and provides direct patient care and consulting on a contract basis at a State operated facility.

contained in an exhibit prepared for the hearing and marked "Tabs 4-9" for the purpose of providing information about crime of which he had been convictd that was critical to the imposition of a fair sanction for his non-medical related felony conviction.[5] He was denied the right to do so.

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[5] Tabs 4 - 9 contained the following evidence:

Tab 4: the report and photographic exhibits prepared by Marshall Gottsegen, D.D.S.;

Tab 5: the report and photographic exhibits and trial transcript of retired FBI agent and photographic comparison expert Lyndal Shaneyfelt;

Tab 6: the trial transcript of government photographic expert Joseph Avignone;

Tab 7: the report prepared by psychologist Perry Presthold, Ph. D. on the photographic lineup from which Dr. Alexander was identified as the bank robber;

Tab 8: the photographic lineup from which witnesses identified Dr. Alexander as the bank robber;

Tab 9: information on Dr. Alexander's financial status at the time of the robbery.

ARGUMENT AND
REASONS FOR GRANTING THE WRIT

By virtue of the Fifth Amendment protection guaranteed all Americans as a consequence of the Fourteenth Amendment to the **United States Constitution**, "...nor shall any State deprive any person of life, liberty, or property without due process of Law..." As a consequence, "... the State may not execute, imprison or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards." **Daniels v. Williams**, 106 S. Ct. 662, 667-678 (1986). (See also, Article I, Section 2 of the **Louisiana Constitution**.) This "guarantee of fair procedure" applies to administrative proceedings as well as to matters adjudicated through the court process.

Cleveland Board of Medical Examiners v. Loudermill, et al., 470 U.S. 532, 541 (1988).

In the instant matter, the state of Louisiana has denied Dr. Alexander procedural due process and equal protection by upholdling administrative proceedings before the Louisiana State Board of Medical Examiners which were fatally flawed for the following two reasons:

a) the Board prohibited Dr. Alexander from presenting any evidence concerning the non-medical related federal conviction for purposes of providing information upon which the Board could base a fair and non arbitrary sanction; and

b) the same attorney acted in the legally irreconcilable roles of prosecuting attorney and legal advisor to the

Board during and subsequent to the hearing.

A. The State Court decision herein denies equal protection and due process to physicians called before the Louisiana State Board of Medical Examiners by denying them the right to present information concerning the non-medical related conviction forming the basis of the disciplinary action

Throughout the entire course of state judicial review of the proceedings conducted by the Louisiana State Board of Medical Examiners and the Board's decision in this matter, there has been a palpable attitude, obliquely referenced in the opinions, that, speaking in the vernacular: "the Board could have revoked respndent's license and it didn't, so what's the beef?" This subliminal influence has resulted in a judicial decision that denies due process and equal protection to physicians who are

duly licensed to practice medicine in Louisiana and who are called before the Board for a disciplinary violation for which they may be sanctioned in manner less than the maximum allowed by state statute.

Though there do not appear to be any reported cases in Louisiana enumerating specific issues of legal relevance or applying constutional quarantees to the process of impsosing anctions at a Medical Board disciplinary proceeding based on the non-medical related conviction of a physician, jurisprudence involving disciplinary actions of the State Bar Association for the same reason provides positive proof that physicians are not treated the same as attorneys. When confronted with the issue in a disciplinary action against an attorney, the Louisiana Supreme Court has ruled

that:

> When a disciplinary proceeding is based on a conviction of a crime, the conviction is conclusive of guilt. Nevertheless, the facts underlying the conviction are extremely important in the determination of the appropriate discipline. Therefore, the facts upon which the conviction was based should be presented in some manner (by introduction of the transcript of the criminal trial, by stipulation or by some other appropriate method) at the hearing before the Commissioner so that the Commissioner and this Court will have the information available for use in the determination of discipline. This information is particularly useful when the conviction was in a federal court or a court of another state and the crime was not a substantive one which parallels a crime defined by Louisiana law. **Louisiana State Bar Ass'n v. Frank**, 472 So. 2d 1, 2 (1985) (*Emphasis added.*)

In a footnote to this portion of its decision, the Louisiana Supreme Court expounded on the rationale for this

position, stating:

> The purpose of that rule, [Art. 15 §8 (7)(c)] is to prevent relitigation of guilt already determined in the criminal proceeding. Nevertheless, there are degrees of culpability and of participation in a crime and both sides in a disciplinary proceeding based on a criminal conviction should be solicitious of insuring that the commissioner and this Court have a complete understanding of the facts underlying the crime. **Louisiana State Bar Ass'n v. Garraway**, 520 So. 2d 400, 401 (1988). See also: **Louisiana State Bar Ass'n v. Brumfield**, 532 So. 2d 1164, 1166 (1988)

In a subsequent case entitled **Louisiana State Bar Ass'n v. Porterfield**, 550 So. 2d 584 (1988), the Louisiana Supreme Court again made the pronouncement that "having found respondent (an attorney) was convicted for purposes of Article 15 §8 does not end our inquiry since our cases state the

facts and circumstances underlying the conviction are very important in determining the appropriate sanction to be imposed in a given case." *Id.* at 588. It is submitted that the same holds true for purposes of L.R.S. 37:1285(A) when the respondent is a physician.

"Part of the consideration in determining an appropriate penalty is an analysis of the evidence upon which the conviction has been obtained." **Louisiana State Bar Ass'n v. Wright**, 538 So. 2d 279, 282 (1989).

Federal Courts have followed this reasoning in reviewing physician discipline inposed by a state agnency . In **Christhilf v. Annapolis Emergency Hospital Ass'n., Inc.**, 496 F. 2d 174 (4th Cir. 1974) the Fourth Circuit Court of Appeals vacated a hospital's non renewal of a physician's privileges

because of the limitations imposed on what evidence the doctor was allowed to present at the administrative hearing. In holding that the Board's action violated due process requirements, the court ruled:

> By limiting the doctor's hearing to simply an admission or denial of their [the incident's] existence, the Board deprived him of an adequate opportunity to defend his privilege to practice . . . At the very least, the Board should have considered along with the documentary evidence of the incidents, the doctor's explanation in justification or mitigation of charges of wrong-doing that had never previously been the subject of a Board hearing. *Id.* at 179.

The practical effect of the State Supreme Court's decision in this matter is to deny physicians the full range of due process considerations afforded to other licensed professionals such as attorneys in Louisiana. The decision,

if not reversed, will serve to validate an administrative hearing that precluded the respondent physician from presenting any evidence about the non-medical related crime for which he was being disciplined under the misguided belief that such evidence would only serve the purpose of relitigating a conviction.

In addition, the state court decision herein authorizes the imposition of sanctions for which the Board articulated no justification and the court provided an *ex post facto* possible justification. Significantly, this decision causes physicians to be treated differently than other licensed professionals in Louisiana, for example attorneys, who are allowed to present evidence about the crime for which they have been convicted for the edification of their peers who must impose a non-

arbitrary and appropriate sancton.

Finally, the decision authorizes a civil sanction that is in direct conflict with this Honorable Court's holding in **United States v. Halper**, 490 U. S. 435 (1989) because it imposes a $5,000 fine and other conditions which can only be punitive in light of Dr. Alexander's federal sentence of imprisonment

B. The State Court decision herein denies a respondent physician in an administrative hearing due process and fundamental fairness by allowing the same attorney to function in the legally irreconcilable roles of prosecutor and legal advisor to the Board.

The attorney acting as the Board's prosecutor violated federal due process guarantees by also acting in the legally irreconcilable role of legal advisor to the Board during and in proceedings that occurred post hearing and pre decision.

During the hearing:

1. the prosecutor "advised" the Board on what evidence offered by the respondent physician should be admitted;

2. the prosecutor "advised" the Board on whether or not to accept respondent physician proffer of excluded evidence;

3. the prosecutor interrupted respondent's counsel during her arguments to the Board to "advise" the Board that she was incorrect;

4. the prosecutor gave the Board "advice" on what constitutes a "final" conviction for their purpose.

In addition,the prosecutor admitted he could not recall whether or not he wrote the Findings of Facts section of the Board's decision but acknowledged he would structure and author the Board's decision and that the Board then "reviewed his draft."

In **Mack v. Florida State Board of Dentistry**, 296 F. Supp. 1259 9.D. Fla. 1969); *mod. in part*, 430 F. 2d 862 (5th Cir. 1970); *cert. denied* 401 U.S. 954 (1971); *rehearing denied* 402 U.S. 925 (1971) the federal district court for the Southern District of Florida found a Florida dentist was denied due process in an administrative hearing where ther prosecutor performed "mixed functions."

Using language equally applicable to this case, the Court wrote:

> ...At the hearing which was to be adversary in nature, the attorney Mr. Randlem wore two hats: that of legal advisor to the supposedly impartial adjudicators of fact, as well as that of advocate for the prosecution...Furthermore, it is tacitly admitted that as to certain objections to questions propounded by Mr. Randle, the Board's legal advisor and prosecutor, he (Mr. Randle) in effect made the ruling.
>
> ....

> Thus, we have the anomalous situation of Mr. Randle asking a question, plaintiff's counsel objecting, whereupon the Board turned to Mr. Randle for advice as to whether his question was ojectionable, and of course, when he said that it was not, the objection was overruled.
>
> ....
>
> Translating the proceedings into criminal procedural terms, we have a final hearing....where the prosecuting attorney acted in some respects as the judge.... Were this a criminal trial being discussed, it could only be characterized as foreign to our notions of fairness and justice.... Id. at 1262-1263.

The opinion of the Fourth Circuit Court of Appeal which was tacitly affirmed by the Louisiana Supreme Court erroneously equates the lack of professional discourtesy and unveiled acrimony with the existence of due process in an administrative hearing. Such a legal conclusion misinterprets fundamental fairness guarantees and is in

conflict with **Mack v. Florida State Board of Dentistry**, 430 F. 2d 862 (5th Cir. 1970); cert. denied 401 U. S. 954 (1971). Unless reversed, the decision will cuase material injustice and significantly affect the public interest.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be issued to review the judgment below and to thereafter vacate the judgment and opinion of that court.

Respectfully submitted,

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Attorney for Petitioner
Victor Alexander, M. D.

Dated this 24th day of May 1995.

APPENDIX A

The Supreme Court of the State of Louisiana

VICTOR ALEXANDER, M. D.

VS. NO. 94-C-3075

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

- - - - - -

IN RE: Alexander, Victor, M. D.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; parish of Orleans Civil District Court Div. "G" Number 89-23541; to the Court of Appeal, Fourth Circuit, Number 91CA-0101

- - - - - -

February 9, 1995

Denied.

WFM
PFC
JLD
JCW
HTL
CDR
JPV

JOHNSON, J. not on panel.

Supreme Court of Louisiana
February 9, 1995

_____
Deputy Clerk of Court for the Court

APPENDIX B

VICTOR ALEXANDER, M. D.	**NO. 94-CA-0101**
VERSUS	**COURT OF APPEAL**
LOUISIANA STATE BOARD OF MEDICAL EXAMINERS	**FOURTH CIRCUIT STATE LOUISIANA**

* * * * * *

AN APPEAL FROM THE CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS, NO. 89-23541, DIVISION "G" HONORABLE ROBIN GIARRUSSO, JUDGE

* * * * * *

MIRIAM G. WALTZER
JUDGE

* * * * * *

(Court composed of Chief Judge Patrick M. Schott, Judge William H. Byrnes, III, and Judge Miriam G. Waltzer)

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STATEMENT OF THE CASE

This is an appeal from a judgment of the Civil District Court for the Parish of Orleans, affirming a decree of the Louisiana State Board of Medical Examiners (Board) imposing certain disciplinary sanctions against appellant, Victor Alexander, M.D. (Alexander).

In 1985, Alexander was indicted by a grand jury in the United States District Court for the Eastern District of Louisiana, and was in 1986 convicted by a jury in that Court of having robbed a federally-insured savings and loan association of over $2,000, a felony violation of 18 U.S.C. § 2113(a). That conviction was reversed[1] based on the

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[1] United States v. Alexander, 816 F. 2d 164 (5th Cir. 1987).

trial court's refusal to admit certain expert testimony concerning the identification of Alexander as the bank robber. Alexander was re-tried and once again convicted by a federal court jury, and this conviction was affirmed.[2]

Following the action of the federal appellate court in 1989, the Board filed an Administative Complaint against Alexander pursuant to LSA-R.S. 37:1285, which provides in pertinent part:

> A. The board may ... suspend or revoke any license ..., or impose probationary or other restrictions on any license ... issued under this Part for the following causes:
>
> Convicton of a crime ... constituting a felony under the laws ... of the United States...
>
> C. The board may, as a probationary condition, or as a condition of the

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[2] United States v. Alexander, 869 F. 2d 808 (5th Cir. 1989), rehearing and rehearing en banc denied 27 April 1989; certiorari denied 493 U.S. 1069, 110 S. Ct. 1110, 107 L. Ed. 2d 1018 (1989).

reinstatement of any license or certificate suspended or revoked hereunder, require the license or permit holder to pay all costs of the board proceedings, ..., and to pay a fine not to exceed the sum of five thousand dollars.

Following an administrative hearing at which Alexander was represented by counsel, the Board rendered Findings of Fact and Conclusions of Law, finding Alexander to be a duly licensed physician who had been found guilty and convicted of a felony under the laws of the United States. By virtue of the Board's findings, it suspended Alexander's license to practice medicine in Louisiana for three years from the date of the judgment, 1 August 1989. The Board further ordered the suspension suspended and stayed effective as of the date on which Alexander would be released from

federal prison, subject to the following probationary terms, conditions and restrictions:

A. Until reinstatement of unrestricted licensure by the Board, Alexander's practice would be limited to an institutional setting or program previously approved by the Board in writing;

B. As express, prior conditions to reinstatement of unrestricted medical licensure to Alexander, he shall have:

1. submitted satisfactory evidence of final discharge from Federal custody;

2. taken and successfully passed the Special Licensing Examination (SPEX) of the Federation of State Medical Boards of the United States, as administered by the Board; and

3. made a personal appearance

before the Board.

C. Alexander would remain on probation for a period of three years following the issuance of the unrestricted license.

D. Alexander would pay a fine of $5,000, which fine will be waived provided that Alexander successfully satisfied and completed the terms and period of probation ordered by the Board.

Alexander applied to the Board to reopen the hearing, which application was denied.

Alexander appealed the Board's ruling to the Civil District Court for the Parish of Orleans which stayed the effect of the Board's decree and remanded the case to the Board, essentially for the relitigation of Alexander's

conviction. On an application for writ of review, this Court reversed, finding the trial court abused its discretion in remanding the case to the Board. The Louisiana Supreme Court denied Alexander's writ application.

The trial court ruled on 4 December 1992 that the law and evidence did not support Alexander's contention that the penalty imposed by the Board should be modified. On 15 December 1992, the trial court entered judgment allowing Alexander to present additional evidence the deposition testimony of Gregory Weiss, the Board's prosecutor, in order to address Alexander's remaining claim of prosecutorial misconduct. The deposition was taken, the case was submitted on 21 July 1993, and judgment was rendered on 1 September 1993, dismissing Alexander's

petition, making the Board's decision executory and lifting the stay. The trial judge found that the record failed to demonstrate that any of the questioned conduct by the prosecutor, including specifically his comments to the Board on evidentiary matters, ultimately made any difference in the outcome of the hearing or the procedure by which Alexander's claim was handled by the agency. In its reasons for judgment, the trial court found:

> "Essentially, the Louisiana Medical Practice Act, LSA-R.S. 37:1285 A(1) charges the Board with the authority to impose disciplinary action against a physician within its jurisdiction upon a determination that the physician has been convicted of a felony. Further, under the Medical Practice Act, the Board has the discretion to impose a full range of licensure sanctions, up to and inlcuding revocation. The Court notes that the penalty imposed on Dr. Alexander's medical license by the Board was significantly less severe than the maximum avalilable."

SCOPE OF REVIEW

This Court's review of the action taken by the Board is "limited to a determination of whether the decision was unreasonable, arbitrary or capricious or amounted to an abuse of discretion." Montalbano v. Louisiana State Board of Medical Examiners, 560 So. 2d 1009, 1011 (La. App. 4th Cir. 1990). Further, we must be cognizant of the "Strong presumption of validity and propriety in such administrative actions where casting judgment upon the professional behavior of a fellow member of a profession is a matter peculiarly within the expetise of an agency composed of members of that profession." Id., citing Wilcox v. Louisiana State Board of Medical Examiners, 446 So. 2d 502 (La. App. 4th Cir. 1984), writ denied, 450 So. 2d 359 (La. 1984); Fisher v. Louisiana State Board of Medical Examiners, 352 So. 2d

729 (La. App. 4th Cir. 1977), writ denied, 353 So. 2d 1338 (La. 1978).

ALEXANDER'S SPECIFICATIONS OF ERROR

1. Alexander was denied due process in his hearing before the Board when the Board utilized the same attorney prosecuting the case on behalf of the Board in the capacity as legal counsel to the Board rather than obtaining the legal advice of outside independent legal counsel.

Alexander rests this specification on three incidents he contends illustrate such a dual capacity on the part of Mr. Weiss.

The hearing was held after Alexander's conviction had been affirmed by the United States Court of Appeal for the Fifth Circuit, but while his

application to the United States Supreme Court for a writ of certiorari was pending. During the hearing, Weiss argued to the Board that Alexander's conviction was "final." In light of the fact the Alexander's counsel had agreed to formally waive any technical objection based on the finality of the federal court conviction, Weiss' argument, whether characterized as argument of counsel or as advice to the Board, was moot.

The second incident relied on by Alexander occurred when Weiss interrupted Alexander's counsel's argument to the Board that it was required to re-examine the factual basis for Alexander's conviction. At that time, Weiss said:

"I'm going to have to interrupt you right here. I'm going to cut you short.

I apologize for interrupting you. I apologize for interrupting your statement, Miss Myers, but that is incorrect."

Alexander contends that this interruption shows that Weiss was acting as general counsel to the Board. We find Weiss' comments to be consistent with his position as prosecutor before the Board. As an advocate, Weiss argued, essentially, that the issue before the Board was not whether Alexander was guilty of a federal felony (as to which the proffer might have probative value), but, under the Board's statutory grant of authority, whether Alexander had been convicted of a federal felony (as to which the proffer was irrelevant).

The third basis asserted by Alexander arises out of a post-hearing letter written by Weiss to the Board concerning Alexander's proffer of certain

exculpatory evidence from his federal trial. At the Board hearing, Weiss had objected both to the admission of the evidence and to its acceptance as a proffer. Following correspondence between Weiss and counsel for Alexander, Weiss acknowledged that the questioned material would be made a part of the administrative record, and the material was received as a proffer.

As authority for his contention that these three incidents constitute prosecutorial misconduct that violated Alexander's right to due process in the administrative hearing[3], Alexander cites

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[3] The guarantee of due process provided in the 14th amendment to the United States Constitution and in the Louisiana Constitution, Article I, § 2, applies to administrative proceedings. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); Ensenat v. Louisiana State Bd. of Medical Examiners, 593 So. 2d 929, 933 (La. App. 4th Cir. 1992).

Allen v. Louisiana State Board of Dentistry, 543 So. 2d 908 (1989), modified on rehearing June 29, 1989, and Mack v.Florida State Board of Dentistry, 430 F. 2d 862 (5th Cir. 1970), certiorari denied 401 U.S. 954, 91 S. Ct. 970, 28 L. Ed. 2d 237 (1971) and 401 U.S. 960, 91 S. Ct. 971, 28 L. Ed. 2d 245 (1971). Neither case requires the conclusion that the Board's action was unreasonable, arbitrary or capricious or amounted to an abuse of discretion.

The issue in Allen was whether the involvement of the prosecutor, Wootan, in the preparation of the committee's findings of fact and conclusions of law violated Allen's due process rights. In Allen, the Court found that the "testimony of . . . members of the panel clearly indicates the committee members never even arrived at detailed findings

and conclusions. They delegated this task to Wootan in his role as counsel to the Board." Allen, supra at 913. Indeed, the prosecutor's assistant testified she used no findings by the committee in preparing the draft findings and conclusions. Because the Court found that Wootan had indeed supplanted the committee's role as finder of fact, it concluded that Allen's due process rights had been violated. The record of the instant case is barren of such proof. The findings and conclusions in this case were succinct: that Alexander was a physician licensed to practice in Louisiana and that he had been convicted of a felony under the laws of the United States were the sole elements required to be found in order to authorize imposition of sanctions under the Medical Practice

Act.

The combination of investigative and judicial functions within an agency was upheld in Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). The Supreme Court set out the burden of proof where a plaintiff asserts that the combination of these functions creates an unconstitutional risk of bias, requiring that the plaintiff:

> "overcome a presumption of honesty and integrity in those serving as adjudicators and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden." Withrow, supra 95. S. Ct. at 1464.

In this case, the Medical Practice Act does not require or permit the Board to ascertain the correctness of the

actions of the federal grand and petit juries or of the Fifth Circuit Court of Appeal or of the United States Supreme Court. The statute asks only whether Alexander was, in fact, convicted of a felony under the laws of the United States or the State of Louisiana. The risk of bias in a case such as this, where the ultimate facts are not in dispute, is non-existent. Had Alexander not been convicted of a felony, his appeal rights fully protect him from the result of an animus on the part of the Board that would have found conviction where there had been none. In this case, the fact of conviction is amply supported by the record and by the reported case in which Alexander was defendant.

Neither does the Mack case support the result Alexander seeks. The Mack

court found plaintiff's due process rights to have been violated by a proceeding in which the counsel for each party "indulged in continuous personal acrimony, charges and countercharges, attacking each other with unconcealed venom, both as to their personal attributes and their professional competency . . . To get down to brass tacks, this was not a hearing. It was an ungoverned confrontation." Mack, supra at 864. The Court specifically said it did not intimate that the Constitution required selection of a competent attorney to, essentially, act as a neutral referee, but held that Mack's "hearing" was too disruptive and acrimonious to constitute a proper hearing within the meaning of due process.

There is no allegation that Alexander's hearing was held in such an atmosphere; indeed, a review of the record shows that the counsel for Alexander and the prosecutor, while strong and able advocates for their respective positions, were respectful and polite in their remarks, and the proceedings were serious and decorous.

We do not find that the actions complained of, when viewed against the jurisprudential background, require a conclusion that Alexander's rights to due process in this administrative proceeding were violated. This specification of error is without merit.

2. The Board erred in refusing to admit "Profer 1."

"Profer 1" contained exculpatory identification evidence and information

concerning Alexander's financial status that had been a part of Alexander's defense in his federal trial.

Alexander contends that the Board's refusal to admit this evidence was erroneous and taints the Board's findings, relying by analogy on Louisiana State Bar Ass'n v. Frank, 472 So. 2d 1 (1985). Alexander alleges that the Board was prevented from having all the background data necessary to administer a fair disciplinary sanction. We believe that Alexander's reliance on Frank is misplaced. The Louisiana Supreme Court held that the facts underlying Frank's conviction for interstate transportation of a counterfeit security (rather than a ubstantive offense such as forgery) were extremely important in the determination of appropriate discipline, holding;

"The Facts upon which the conviction

was based should be presented in some manner . . . at the hearing . . . so that the commissioner and this court will have the information available for use in the determination of discipline. This information is particularly useful when the conviction was in a federal court or a court of another state and the crime **was not a substantive one which parallels a crime defined by Louisiana law.**" Frank, supra at 2 (emphasis added).

The Court found that because the government was required to prove only that Frank caused the security to be placed in interstate commerce when he knew or should have known it to have been counterfeit made it "important to review the evidence produced at the criminal trial before discussing the appropriate discipline." Id.

ALexander's crime was bank robbery, and his participation as set forth in his conviction was patent. The considerations of intentional partici-

pation and possible varying degrees of moral culpability present in Frank are absent in the case at bar. This specification of error is therefore without merit.

3. The penalty imposed on Alexander was arbitrary and capricious and violative of the prohibition against double jeopardy.

Alexander contends that the penalty imposed by the Board constitutes double jeopardy under the standard of U.S. v.Halper, 490 U.S. 435, 448-449, 109 S. Ct. 1892, 1901-1902, 104 L. Ed. 2d 487 (1989).[4] In Halper, the Court

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[4] If this argument is interpreted as an attack on the constitutionality of the Medical Practice Act, it has been waived by Alexander's failure so to plead below. "A litigant who fails to plead the unconstitutionality of a statute cannot legally raise the constitutional issue in the appellate court." Montalbano v. Louisiana v. Louisiana State Board of Medical Examiners, 560 So. 2d 1009, 1010 (La. App. 4th Cir. 1990).

struck down as disproportionate and violative of Double Jeopardy a civil penalty of $130,000 under the False Claims Act where the Government's expenses approximated $16,000, holding:

> "[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment . . . We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an aditional civil sanction to the extent that the second sanction my not fairly be characterized as remedial, but only as a deterrent or retribution."

The Court recognized that the inquiry is "not an exact pursuit." Clearly, the Board may tailor a remedy that will compensate it for its own costs in the

investigation and prosecution of the matter. As further guidance to this court of review, the Supreme Court held:

> "We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment." Halper, supra, 490 U.S. at 450, 109 S. Ct. at 1092.

In the instant case, the $5000 fine is conditional and will not be imposed provided that Alexander fulfills the conditions of his probation as set forth in the Board's decree: restricted practice while in custody, evidence of final discharge from federal custody, passage of the Special Licensing Examination of the Federation of State Medical Boards of the United States, as administered by the Board, and a personal appearance before the Board. We find

that the court did not abuse its discretion in failing to find that this conditional fine, under the circumstances of this case, violated Alexander's privilege against Double Jeopardy.

We find the trial court did not err when it failed to find the Board's decree to be arbitrary and capricious. The imposition of a requirement that Alexander demonstrate, by taking and passing the SPEX, that his skills as a physician had not been deteriorated during the period of his trials, appeals and incarceration is clearly within the Board's authority and is designed not to punish Alexander, but to protect the public whom he may seek to serve. Alexander's third assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the judgment of the Civil District Court for the Parish of Orleans dismissing the petition of Victor Alexander, M. D., affirming the decree of the Louisiana Board of Medical Examiners and lifting the stay of that decree is affirmed

AFFIRMED

APPENDIX C

In the Matter Of **NO. 89-A-010**

VICTOR ALEXANDER, M.
(Certificate No. 05931R)

DECISION

Respondent.

* * * * * *

An administrative hearing was convened before the Louisiana State Board of Medical Examiners (Board) on July 20, 1989, to adjudicate alleged violations of the Louisiana Medical Practice Act[1] by Victor Alexander, M.D., Respondent herein.[2] A quorum of the Board was

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[1] LA. REV. STAT. ANN. §§ 37:1261-1292 (West 1988 & Supp. 1989).

[2] By Administrative Complaint filed April 13, 1989, Respondent was charged with "[c]onviction of a crime. . . constituting a felony under the laws of Louisiana or of the United States. LA. REV. STAT. ANN. § 37:1285(A)(1) (West 1988).

present.[3] Respondent was present and was represented by legal counsel.[4]

Upon consideration of the evidence admitted, pursuant to La. Rev. Stat. § 49:958, the Board renders the following findings of fact, conclusions of law and decision.

Findings of Fact

1. Respondent, Victor Alexander, M.D., is a physician duly licensed by the Board to practice medicine in the state of Louisiana.

2. Pursuant to a jury verdict rendered August 10, 1987, on February 24, 1988, in the United States District Court for the Eastern District of Louisiana, Respondent was found guilty and convicted of having, on May 21, 1985,

[3]. The hearing panel comprised Drs. Muslow, Bordelon, Laborde, Hackett, LaNasa and Kaplan. Dr. Nunnally took no part in the hearing, consideration or decision of this case.

[4]. Sheila C. Myers, Esq., New Orleans, Louisiana.

robbed a Federally-insured New Orleans, Louisiana, savings and loan institution, in violation of 18 U.S.C. § 2113(a). Pursuant to such conviction, Dr. Alexander was sentenced by the court to a term of imprisonment of three years.[5] Respondent's conviction was affirmed by the United States Court of Appeals for the Fifth Circuit.[6]

3. Dr. Alexander does not currently suffer from any material or significant physical or psychological impairment which compromises his ability to practice medicine with reasonable skill and safety to patients.

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[5] Judgment and Probation/Commitment Order, *United States of America v. Victor Alexander*, No. 85-243 (U.S.D. Ct., E.D. La., Feb. 24, 1988).

[6] United States v. Alexander, 869 F. 2d 808 (5th Cir., Mar. 28, 1989), *reh. denied*, 874 F. 2d 812 (5th Cir., Apr. 27, 1989).

Conclusions of Law

Based on the foregoing findings of fact, the Board concludes, as a matter of law, that:

1. Violation of 18 U.S.C. § 2113(a) constitutes a felony under the laws of the United States.

2) By virtue of his conviction of a crime constituting a felony under the laws of the United States, lawful cause exists for the suspension or revocation of Respondent's license to practice medicine in the state of Louisiana, pursuant to La. Rev. Stat. § 37:1285(A)(1).

Decision

Considering the foregoing,

IT IS ORDERED that the license of Victor Alexander, M.D., to practice medicine in the state of Louisiana, as evidenced by Certificate No. 05931R, be, and the same is hereby, SUSPENDED for a period of three years from the date hereof.

IT IS FURTHER ORDERED that the

foregoing order of suspension shall itself be SUSPENDED AND STAYED, effective as of the date on which Dr. Alexander may be released from Federal imprisonment, provided that, as an express condition of such suspension and stay, Dr. Alexander shall accept, strictly comply with and satisfy the following probationary terms, conditions and restrictions:

A. *Restricted Practice During Continuing Custody.* Following his release from incarceration, during such period as he may remain in Federal custody in a half-way house or similar setting, and thereafter until reinstatement of unrestricted licensure by the Board, Dr. Alexander shall not engage in the practice of medicine in any form in the state of Louisiana other than at a health care institution or program previously approved by the Board in writing. Subject to such approval by the Board, upon satisfactory evidence submitted by Dr. Alexander that he has been released from incarceration and has secured a position at a health care institution or program, the Board shall issue a restricted probational license to Dr. Alexander authorizing such restricted practice.

B. *Reinstatement of Unrestricted Probational Licensure.* As express, [sic.] prior conditions to the Board's

reinstatement of unrestricted medical licensure to Dr. Alexander shall have: (1) submitted satisfactory evidence of his final discharge from Federal custody; (2) taken and successfully passed the Special Licensing Examination (SPEX) of the Federation of State Medical Boards of the United States, as administered by the Board; and (3) made a personal appearance before the Board. Upon his satisfaction of such conditions, the Board shall issue a license to Dr. Alexander which shall be unrestricted as to his medical practice but shall be probational, and remain on probation, for a period of three years following the date of issuance of such license.

IT IS FURTHER ORDERED that Dr. Alexander shall be assessed and pay a fine to the Board in the amount of Five Thousand and No/100 Dollars ($5,000.00); provided, however, that such fine shall be waived by the Board provided that Dr. Alexander successfully satisfies and complete [sic.]the terms and period of probation ordered herein.

IT IS FURTHER ORDERED, that any violation of the probationary terms, conditions and restrictions set forth herein shall be deemed just cause for the

suspension or revocation of the medical licensure of Victor Alexander, M.D., or for such other disciplinary action as the Board deems appropriate, as if such violations were enumerated among the causes provided for by La. Rev. Stat. § 38:1285.

New Orleans, Louisiana, this 1 day of August, 1989.

LOUISIANA STATE BOARD OF
MEDICAL EXAMINERS

By: IKE MUSLOW, M.D.
President